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Proposed Regulation Agency Background Document

Agency name	DEPARTMENT OF EDUCATION
Virginia Administrative Code (VAC) citation	8VAC20-740-10 et seq.
Regulation title	REGULATIONS GOVERNING NUTRITIONAL GUIDELINES FOR COMPETITIVE FOODS SOLD IN THE PUBLIC SCHOOLS
Action title	To establish nutritional guidelines for all foods sold to students in the public schools during the regular school day that are not part of the national school lunch or school breakfast programs.
Date this document prepared	June 15, 2011

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 14 (2010) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

In a short paragraph, please summarize all substantive provisions of new regulations or changes to existing regulations that are being proposed in this regulatory action.

Senate Bill 414 (2010 Acts of Assembly) amended the *Code of Virginia* by adding Section 22.1-207.4 on nutritional guidelines for competitive foods. The legislation requires the Board of Education, in cooperation with the Department of Health, to promulgate and periodically update regulations setting nutritional guidelines for all competitive foods sold to students during regular school hours that are not part of the federal school lunch or school breakfast program. The term “competitive foods” refers to food items served in the school setting outside of planned meals under the federal school lunch and school breakfast programs, and which may compete with foods served under the federal programs. The regulations to be developed pursuant to the legislation are required to address calorie, fat, sugar, and sodium content, and may address other areas.

In addition, federal regulations require every school division to have wellness policies that address nutrition and physical activity. The content and implementation of these policies have

been at the discretion of the local school divisions. The proposed regulations would require each local school board to adopt the state nutrition guidelines as part of their existing local wellness policies.

Acronyms and Definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the “Definition” section of the regulations.

N/A. Acronyms defined in the body of the document.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

Legal authority: SB 414 (2010) enacted on April 13, 2010, as Chapter 718 and codified as Section 22.1-207.4, *Code of Virginia*. Mandatory authority.

Promulgating entity: Virginia Board of Education in cooperation with the Department of Health.

Purpose

Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve.

The rising rate of childhood obesity has become a major health concern, because of both its impact on childhood health and as a contributing factor to the development of chronic disease in adulthood. In response to this growing concern, attention has focused on the need to establish nutrition standards for foods in schools by offering healthier food options on school grounds. From a nutritional perspective, the goal is to increase the consumption of whole grains, fruits, vegetables, and nonfat or low-fat dairy, and reduce fat, sugars, and sodium. Federal regulations governing the national school lunch program, school breakfast program, and afterschool snack program establish nutrition standards for school meals/snacks, and strengthened federal nutrition standards are pending. Nutritional standards for competitive foods can complement the federal school meal nutrition standards for an overall healthier eating environment in schools. In addition, it is anticipated the U.S. Department of Agriculture will establish nutritional standards for competitive foods in schools.

Substance

Please briefly identify and explain new substantive provisions (for new regulations), substantive changes to existing sections or both where appropriate. (More detail about all provisions or changes is requested in the “Detail of changes” section.)

SB 414 (codified as Section 22.1-207.4, *Code of Virginia*) requires in the development and implementation of the regulations that:

1. nutritional guidelines are established for all competitive foods sold to students on school grounds during regular school hours. “Competitive food” means any food, excluding beverages, sold to students on school grounds during regular school hours, that is not part of the school breakfast or school lunch programs. In the school setting, these are typically food items sold to students as à la carte items in the cafeteria, in vending machines, in school stores/snack bars, and through other school activities. SB 414 did not include “beverages” under the definition of “competitive food.” In addition, food items served or provided, but not sold, to students, or those sold outside regular school hours or off school grounds are outside the purview of these regulations. At a minimum, the regulations must address calorie, fat, sugar, and sodium content.
2. as specified in the second enactment clause, the guidelines be based on the Institute of Medicine's (IOM) nutrition standards for competitive foods in schools or the competitive food guidelines established by the Alliance for a Healthier Generation as the initial statewide standard for competitive foods;
3. the guidelines be periodically reviewed by the Board of Education with assistance from the Department of Health to ensure they remain current, science-based, and consistent with any changes to the federal laws or regulations on competitive foods; and
4. as specified in the fifth enactment clause, local school boards adopt the state guidelines as part of their existing local wellness policy to ensure compliance with the provisions of subsection A of Section 22.1-207.4.

Consistent with SB 414 and the core nutrition components in the IOM standards, the proposed regulations set nutritional standards for competitive foods sold to students in the areas of calorie, fat, sugar, sodium content, and foods of minimal nutritional value. It is anticipated that the U.S. Department of Agriculture will use the IOM standards in establishing nutritional standards for competitive foods.

Issues

Please identify the issues associated with the proposed regulatory action, including:

- 1) *the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) *the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) *other pertinent matters of interest to the regulated community, government officials, and the public.*

If the regulatory action poses no disadvantages to the public or the Commonwealth, please indicate.

Nutritional standards for competitive foods can complement the federal school meal nutrition standards for an overall healthier eating environment in schools.

Additionally, the rising rate of childhood obesity has become a major health concern, because of both its impact on childhood health and as a contributing factor to the development of chronic disease in adulthood. In response to this growing concern, attention has focused on the need to establish nutrition standards for foods in schools by offering healthier food options on school grounds. Federal regulations governing the national school lunch program, school breakfast program, and afterschool snack program establish nutrition standards for school meals/snacks, and strengthened federal nutrition standards are pending. In addition, it is anticipated the U.S. Department of Agriculture will establish nutritional standards for competitive foods in schools.

Statewide nutritional guidelines for competitive foods sold to students during the school day would strengthen the local wellness policies and help address some of the factors that impact childhood obesity, as well as increase the nutritional quality of foods offered in the school setting.

The adopted regulations could affect schools' ability to continue to sell certain competitive food items to students. School divisions will be required to adopt the nutritional guidelines contained in the regulation as part of their local wellness policies.

Requirements more restrictive than federal

Please identify and describe any requirements of the proposal, which are more restrictive than applicable federal requirements. Include a rationale for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

At present, there is no federal regulation for competitive foods sold in schools. The U.S. Department of Agriculture is in the process of developing nutrition standards for competitive foods, as authorized under the 2010 federal legislation that reauthorizes the federal school meal programs (Healthy, Hunger-Free Kids Act of 2010). The Institutes of Medicine's standards will be the basis for the federal regulations.

SB 414 requires this regulation be periodically reviewed by the Board of Education with assistance from the Department of Health to ensure they remain current, science-based, and consistent with any changes to the federal laws or regulations on competitive foods.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

The adopted regulation would apply to all public school divisions, public schools, and school food authorities (SFAs) in the Commonwealth of Virginia.

Public participation

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.

In addition to any other comments, the board/agency is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the agency/board is seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so via the Regulatory Town hall website, www.townhall.virginia.gov, or by mail, email or fax to Catherine Digilio Grimes, Director of School Nutrition Programs, Virginia Department of Education, P.O. Box 2120, Richmond, VA 23218-2120, (804) 225-2074, fax (804) 786-3117, e-mail schoolnutritionprograms@doe.virginia.gov.

Written comments must include the name and address of the commenter. In order to be considered, comments must be received by the last date of the public comment period.

A public hearing will be held and notice of the public hearing may appear on the Virginia Regulatory Town Hall website (www.townhall.virginia.gov) and the Commonwealth Calendar. Both oral and written comments may be submitted at that time.

Economic impact

Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirements create the anticipated economic impact.

<p>Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source, and (b) a delineation of one-time versus on-going expenditures.</p>	<p>The impact on the Department of Education to develop and implement these regulations is not expected to be significant and can be absorbed with existing staff. It is expected that the department will have to provide ongoing staff support and technical assistance to divisions in the implementation of these regulations.</p>
<p>Projected cost of the new regulations or changes to existing regulations on localities.</p>	<p>It is anticipated that the adopted regulations will impact all school divisions 1) administratively, as they will be required to adopt the new state nutritional guidelines as part of their required local wellness policies; and 2) possibly financially, as they change the food offerings on the school site during the school day to meet the adopted nutritional guidelines. Projected cost impact unknown.</p>
<p>Description of the individuals, businesses or other entities likely to be affected by the new regulations or changes to existing regulations.</p>	<p>Students in the public schools and their parents. Local school personnel, particularly in individual schools. Food purveyors who conduct business with schools.</p>
<p>Agency’s best estimate of the number of such entities</p>	<p>1.3 million public school students, 132 school divisions,</p>

<p>that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>and approximately 1,900 public schools. Estimate of the number of food purveyors/small businesses unknown.</p>
<p>All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and include all costs. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses. Specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.</p>	<p>Projected costs unknown. The proposed regulations could impact current competitive food items sold to schools for resale to students. Alternative products that comply with the proposed nutritional guidelines may have to be developed or offered. Additional nutrient analysis may have to be conducted on current and future food items to ensure compliance with the nutritional guidelines.</p>
<p>Beneficial impact the regulation is designed to produce.</p>	<p>Healthier school eating environment and improved student health.</p>

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in §2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.

None. The regulations are required by statute to be developed.

Regulatory flexibility analysis

Please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

None. The regulations are required by statute to be developed

Public comment

Please summarize all comments received during the public comment period following the publication of the NOIRA, and provide the agency response.

Two comments were received during the public comment period following the publication of the NOIRA.

Commenter	Comment	Agency response
<p>Jack Oak, View Law Group</p>	<p>The program should set strict nutritional guidelines in place so that it can provide about 1/3 of the daily nutritional needs of the children. The proliferation of competitive food should be checked so that it does not undermine the child's health. Also, the culture of fast food is a serious concern.</p>	<p>Strengthened federal school meals standards, in conjunction with the proposed regulations and pending federal standards for competitive foods, are intended to result in a healthier school eating environment in Virginia.</p>
<p>Cathy Sturgeon, Virginia Association of School Nurses</p>	<p>Virginia Association of School Nurses (VASN) supports the proposed regulations. School nurses work every day to keep Virginia’s public school students healthy, to prevent the spread of infectious and communicable diseases, and to promote healthy environments in which students can prosper and learn. We are alarmed at the epidemic of overweight and obesity that afflicts more of our students, at every age, each year. The school environment should aim to deliver the message that good nutrition is best for children’s health now and throughout adulthood. VASN believes that the new regulations will have a positive impact on the health of Virginia’s public school children. Stakeholder groups such as the VAPTA should be considered in the development of these guidelines, because, in the final analysis, parents should support and encourage healthy nutritional choices for their children. This regulation may spark entrepreneurial efforts among businesses to offer healthy alternative nutritional choices to children.</p>	<p>Strengthened federal school meals standards, in conjunction with the proposed regulations and pending federal standards for competitive foods, are intended to result in a healthier school eating environment in Virginia.</p>

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one’s spouse, and one’s children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The regulations will increase the nutritional quality of competitive foods offered to students in the public schools with the goal of increased student health.

Detail of changes

Please list all changes that are being proposed and the consequences of the proposed changes. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact if implemented in each section. Please describe the difference between the requirements of the new provisions and the current practice or if applicable, the requirements of other existing regulations in place.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all provisions of the new regulation or changes to existing regulations between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.

For changes to existing regulations, use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, rationale, and consequences

For new chapters, use this chart:

Section number	Proposed requirements	Other regulations and law that apply	Intent and likely impact of proposed requirements
8VAC20-740-20. Applicability.	A. This regulation shall apply to all public school divisions, public schools, and school food authorities (SFAs) in the Commonwealth of Virginia. B. This regulation shall not apply to beverages. C. This regulation shall apply to the		Improved nutritional quality of foods offered during regular schools hours to contribute to an overall healthful eating environment, reinforce healthy eating behaviors, and contribute to improved student health.

Section number	Proposed requirements	Other regulations and law that apply	Intent and likely impact of proposed requirements
	<p>nutritional content of food items, excluding beverages, sold to students on the school grounds of any public school during regular school hours. It shall include:</p> <ul style="list-style-type: none"> a. foods sold to students in vending machines. b. foods sold to students as à la carte items in the school cafeteria. c. foods sold to students at snack bars and stores operated by the school, a student association, or other school-sponsored organization. d. foods sold to students at school activities such as fundraisers. <p>D. This regulation shall not apply to the nutritional content of foods and beverages:</p> <ul style="list-style-type: none"> a. provided through the National School Lunch, School Breakfast, and Afterschool Snack Programs, as regulated by 7 CFR 210 and 220. b. sold at snack bar, concession stands, or athletic events after 		

Section number	Proposed requirements	Other regulations and law that apply	Intent and likely impact of proposed requirements
	<p>regular school hours.</p> <p>c. sold either during intermission or immediately before or after athletics events.</p> <p>d. sold for school-related fundraising activities that take place off school grounds.</p> <p>e. sold during activities that take place after regular school hours, such as clubs, yearbook, band and choir practice, student government, drama, sports practices, interscholastic sporting events, school plays, and band concerts.</p>		
<p>8VAC20-740-30. Nutrition standards.</p>	<p>Competitive foods sold to students shall support the Dietary Guidelines for Americans by complying with the following nutritional standards:</p> <p>A. Standard 1: Calories</p> <p>a. Snack items shall be 200 calories or less per portion, or as packaged.</p> <p>b. À la carte entrée items shall not exceed calorie limits on comparable National School Lunch Program (NSLP) entrées.</p>		<p>Improved nutritional quality of foods offered during regular schools hours to contribute to an overall healthful eating environment, reinforce healthy eating behaviors, and contribute to improved student health.</p>

Section number	Proposed requirements	Other regulations and law that apply	Intent and likely impact of proposed requirements
	<p>À la carte entrée items shall not provide more calories or larger portion sizes than the comparable NSLP entrée items. In accordance with 8VAC20-290-10, à la carte entrée items for sale to students shall be limited to those entrée items recognized as being components of the school breakfast program or school lunch program meal patterns.</p> <p>B. Standard 2: Fat</p> <p>a. Snacks and food items shall meet the following criteria for dietary fat per portion, or as packaged:</p> <p>i. No more than 35 percent of total calories from fat.</p> <p>ii. Less than 10 percent of total calories from saturated fats.</p> <p>iii. Zero grams of trans fat.</p> <p>b. Exceptions: Nuts and seeds (allowed as combination products as long as other nutrient</p>		

Section number	Proposed requirements	Other regulations and law that apply	Intent and likely impact of proposed requirements
	<p>standards are met; the fat content will not count against the total fat content of the product).</p> <p>C. Standard 3: Sugar</p> <p>a. Snacks and food items shall provide no more than 35 percent of calories from total sugars per portion, or as packaged.</p> <p>b. Exceptions:</p> <p>i. 100 percent fruits and fruit juices in all forms without added sugars.</p> <p>ii. 100 percent vegetables and vegetable juices without added sugars.</p> <p>iii. Unflavored non-fat and low-fat (1%) milk and yogurt.</p> <p>iv. Flavored non-fat and low-fat (1%) milk with no more than 22 grams of total sugars per 8-ounce serving.</p> <p>v. Flavored non-fat and low-fat yogurt with no more</p>		

Section number	Proposed requirements	Other regulations and law that apply	Intent and likely impact of proposed requirements
	<p>than 30 grams of total sugars per 8-ounce serving.</p> <p>D. Standard 4: Sodium.</p> <p>a. Snack items shall meet a sodium content limit of 200 mg or less per portion, or as packaged.</p> <p>b. À la carte entrée items recognized as being components of the school breakfast program or school lunch program meal patterns that are not part of the planned reimbursable menu shall meet a sodium content of 480 mg or less per portion. Portion sizes for à la carte entrée items shall not be larger than the comparable portion size for NSLP entrée items.</p> <p>E. Standard 5: Foods of minimal nutritional value In accordance with 8VAC 20-290-10 and federal regulation 7 CFR 210, all Foods</p>		

Section number	Proposed requirements	Other regulations and law that apply	Intent and likely impact of proposed requirements
	of Minimal Nutritional Value (FMNV) as defined in 8VAC20-740-10 shall be prohibited from being sold to students on school grounds during regular school hours.		
8VAC20-740-40. Implementation and Compliance.	A. Each local school board shall adopt these nutrition guidelines as part of its existing local wellness policy. B. Each local school board shall submit annually to the Department of Education the School Health Advisory Board (SHAB) Progress Report, as required by § 22.1-275.1. This report shall include a status report on the development and implementation of the Local Wellness Policy. This report shall be used by the Department of Education to monitor compliance with these nutrition guidelines.		Improved nutritional quality of foods offered during regular schools hours to contribute to an overall healthful eating environment, reinforce healthy eating behaviors, and contribute to improved student health.

Enter any other statement here

As specified in the third enactment clause of SB 414, the proposed regulations have been drafted with the assistance of the Department of Health, the School Nutrition Association of Virginia, the American Heart Association, the American Cancer Society, the Virginia chapter of the American Academy of Pediatrics, the Virginia Wholesalers and Distributors Association, the Virginia Automatic Merchandising Association, and other stakeholders.

The Department of Education conducted meetings with the above stakeholders on March 24, April 21, and May 25, 2011, to develop draft nutrition guidelines. The Institute of Medicine’s (under the National Academy of Sciences) *Nutrition Standards for Foods in Schools: Leading the Way toward Healthier Youth* was used as the basis for the nutritional standards in the

proposed regulations. The IOM standards were used since it is anticipated that the U.S. Department of Agriculture will use them in developing its own nutritional standards for competitive foods, as it is authorized to do under the 2010 federal legislation that reauthorizes the federal school meal programs (Healthy, Hunger-Free Kids Act of 2010).